PATCO MALAYSIA BHD.

v.

TUAN HAJI SARIP BIN HAMID & ANOR.

HIGH COURT, KUALA LUMPUR
DATO' ABU MANSOR BIN ALI J.
[ORIGINATING MOTION NO. R1-25-43 OF 1992]
26 JANUARY 1993

INDUSTRIAL LAW: Award of reinstatement by Industrial Court - Whether capable of being stayed by the High Court - Section 33B(2) Industrial Relations Act 1967 - Whether clause of section precluded issue of certiorari - Whether jurisdictional review of the High Court adversely affected by section.

The applicant had been given leave by the High Court to apply for *certiorari* to quash an award of reinstatement made by the Industrial Court and in consequence of that grant the High Court made a further order for stay of proceeding against the said award. The respondent applied to strike out both orders on the ground that the applicant was guilty of misconduct as it failed, inter alia, to bring to the notice of the Court when applying for the said leave, the full import of s. 33B(2) of the Industrial Relations Act 1967 (the Act). Counsel for the respondent submitted that s. 33B(2) aforesaid in effect barred the High Court from granting a stay order in respect of an order of reinstatement made by Industrial Court and therefore the order for stay in this case had not been properly or lawfully made and ought to be set aside.

The main issue was whether in the light of the provision of s. 33B(2) of the Act the High Court was precluded from making a stay order in respect of an award of reinstatement made by the Industrial Court.

Held:

[1] The order for stay has been properly and lawfully made. The power of the Court to order stay is part of the powers to grant leave for an order of *certiorari* and it is not affected by the provision of s. 33B(2) of the Act. In this case as the order for reinstatement of the Industrial Court has been challenged it cannot be taken as having in it a stamp of finality and therefore it is only logical that the order for stay be made until the matter is finally disposed of.

[2] It is not too difficult to see what damage the claimant would have left in his trail if the reinstatement order is not stayed and is later found by the High Court to have been wrongly made. For one thing the wages and emoluments collected would have been beyond recall. To interpret that the Court has no power to order stay would thus lead to absurdity.

[Respondent's application for setting aside the Court's order for stay dismissed].

Cases referred to:

Malayan Banking Bhd. v. Association of Bank Officers, Peninsular Malaysia & Anor. [1988] 3 MLJ 204 ***(refd)***

Sabah Banking Employees' Union v. Sabah Commercial Banks' Association [1989] 2 MLJ 284 ***(refd)***

Legislatioon referred to:

Courts of Judicature Act 1964, s. 25
Industrial Relations Act 1967, s. 33B(1), (2)
Rules of the High Court 1980, O. 53

Other sources referred to:

Supreme Court Practice 1988, Vol. 1, p. 14 of P1, Order 53/1-14/27

For the applicant - Ambiga Sreenevasan; M/s. Skrine & Co.

For the 1st respondent - B. Lobo; M/s. Lobo & Associates

JUDGMENT

Abu Mansor bin Ali J:

Dalam notis usul bertarikh 28 Mei 1992, lampiran (6) pemohon memohon perintah seperti berikut:

> AMBIL PERHATIAN bahawa menurut kebenaran Yang Arif Tuan Hakim Dato' Wan Adnan bin Ismail yang diberikan pada 22 Mei 1992, Mahkamah akan mengusulkan pada hari Selasa pada 21 Julai 1992 pukul 9.00 pagi, atau seberapa cepat selepas itu yang boleh didengar oleh Peguam bagi pihak Patco Malaysia Bhd., Pemohon yang dinamakan di atas untuk suatu Perintah *certiorari* untuk mengalihkan ke Mahkamah Mulia ini dengan tujuan supaya ia membatalkan Award No. 89 tahun 1992 bertarikh 27 April 1992 yang dibuat oleh Mahkamah Perusahaan, iaitu responden kedua yang dinamakan di atas, dalam kes Mahkamah Perusahaan No. 2/4-117/1987 atas alasan yang dinyatakan dalam salinan Pernyataan yang disampaikan di sini digunakan atas permohonan membenarkan untuk memohon Perintah sedemikian.

Dan bahawa kos bagi permohonan ini dan kos sampingan baginya boleh dibayar oleh responden pertama.

DAN AMBIL PERHATIAN bahawa pada pendengaran usul ini pihak pemohon akan menggunakan Afidavit Haji Abdul Rashid B. Mohd Yusoff yang diikrarkan pada 21 Mei 1992 serta ekshibit-ekshibit dirujukkan di dalamnya.

DAN AMBIL PERHATIAN SELANJUTNYA bahawa Yang Arif Tuan Hakim Dato' Wan Adnan Bin Ismail melalui Perintah bertarikh 22 Mei 1992 mengarahkan bahawa semua bentuk perlaksanaan prosiding terhadap Award No. 89 tahun 1992 digantungkan sehingga kesudahan muktamad atau penentuan muktamad usul ini.

Dan pada 30 Jun 1992, responden pertama (pemohon) telah mengeluarkan satu notis usul bertarikh 30 Jun 1992 (enclosure 10) memohon perintah-perintah seperti di bawah:

(a) bahawa kebenaran yang diperolehi oleh pemohon daripada Mahkamah Mulia ini diketepikan, dan atau
(b) bahawa kuasa budibicara dan relief yang diberikan olehnya kepada pemohon dalam prosiding ini dalam notis usul bertarikh 28 Mei 1992 ditolak.
(c) bahawa kos dalam permohonan dan kesemua prosiding berikutan dalam permohonan ini dibayar oleh pemohon kepada responden.

Di dalam lampiran (6) Cik Ambiga untuk pemohon dan Encik Lobo bertindak untuk responden pertama.

Dan di dalam lampiran (10) Encik Lobo untuk pemohon/responden pertama dan Cik Ambiga untuk pemohon.

Parties have agreed to proceed by Mr. Lobo proceeding with enclosure (10) first and then Cik Ambiga replying thereto. After that Miss Ambiga deals with enclosure (6) as applicant and Mr. Lobo as the respondent. Mr. Lobo begins the argument and refers his affidavit evidence and authorities.

Mr. Lobo first point was the alleged misconduct of the applicant so-called in not bringing to the Court's attention when applying for leave, Mr. Lobo's letter from Lobo & Co. dated 19 May 1992 requiring the applicant to serve all papers to enable him to seek instructions of his client if the client has any preliminary objection. Mr. Lobo submitted the applicant is guilty of misconduct in not disclosing the letter to us and if that was done this Court would have ordered the matter to be heard *inter partes.*

On this alleged purported misconduct Miss Ambiga for the applicant in reply refers the Court to the letters in affidavit enclosure (9), page 3, especially to Mr. Lobo's letter dated 19 May 1992 to Shearn & Delamore, for the applicant therein, at page 3 asking applicant to give notice that he wanted service of any application made by the applicant to quash the award but unfortunately that said letter did not come to applicant's Counsel's attention somehow. Cik Ambiga applicant's Counsel referred the Court to O. 53 of the High Court Rules 1980 (page 2 of Bundle P1), to point out that it has never been the practice that applicant in an *ex parte* application applies to make it *inter partes*, it is always the Court which will order it to be so if it required. In any case assuming the said letter was received by applicant in time, Counsel said would have been the practice to inform the respondent. Since it was not received by her, she submitted that there was no misconduct on the applicant's Counsel's part.

In any event the applicant's Counsel's first reaction on being informed of the letter was an offer to go back to the learned Judge (see page 13 and page 15) and page 77. She further submitted that all *ex parte* orders obtained, may be varied on the respondent's application. It is trite law that *ex parte* orders such as the one obtained are not final and the Court is not functus officio as where the respective rights of the different parties are already adjudicated; not so in this case.

I find there is merit in the argument of Miss Ambiga that there is no misconduct in not having served the papers on the respondent before applying for leave.

Applicant is also charged for the purported misconduct of not bringing to the Court's notice s. 33B(2) of the Industrial Relations Act 1967, when applying for leave. Respondent's Counsel submitted s. 33B(2) bars the High Court from granting a 'stay' order of a reinstatement made by the Industrial Court.

Section 33B(2) of the Industrial Relations Act reads:

> Subject to the provisions of s. 33A, no award of the Court for the reinstatement or

re-employment of a workman shall be subject to any stay of proceedings by any Court.

Applicant's Counsel submitted that s. 33B(2) is adjunct to s. 33B(1) thereof and it is submitted it should be treated as sort of s. 33B(1) and should not apply where leave to apply for *certiorari* is given.

In *Malayan Banking Bhd. v. Association of Bank Officers Peninsular Malaysia & Anor.* [1988] 3 MLJ 204 the Supreme Court held inter alia (1) s. 33B(l) of the Industrial Relations Act enacts a privative clause precluding *certiorari* in respect of any award, decision or order of the Industrial Court under the Act. A privative clause of this nature, however, is not operative in the face of jurisdictional defect or fraud and has no effect at all as regards jurisdictional review. The Supreme Court appears to have taken the same view on this s. 33B(1) of the Industrial Relations Act 1967 in *Sabah Banking Employees' Union v. Sabah Commercial Banks' Association* [1989] 2 MLJ 284.

Applicant's Counsel submitted further the Court's power to order stay comes from s. 25 of the Courts of Judicature Act 1964 read with its Schedule and Rules of the High Court. The section reads:

> Section 25.(1) Without prejudice to the generality of Article 121 of the Constitution the High Court shall in the exercise of its jurisdiction have all the powers which were vested in it immediately prior to Malaysia Day and such other powers as may be vested in it by any written law in force within its local jurisdiction.
>
> (2) Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule:
>
> > Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same.

From these provisions learned Counsel for the applicant submitted s. 33B(1) and s. 33B(2) of the Industrial Relations Act 1967 do not conflict with the Courts of Judicature Act 1964 (Revised) and a harmonious interpretation is possible and she submitted s. 33B(1) and s. 33B(2) are not effective in the face of jurisdictional error.

Secondly, Counsel submitted that the Court's power to order stay is part of the powers to grant leave for an order of *certiorari*. It is not a separate power of stay. Therefore if the Court has the power to grant leave despite s. 33B(1) then if that leave operates as a stay it cannot be affected by s. 33B(2).

I find merit in the argument of learned Counsel so far and I do not find it necessary to consider all the other grounds raised. Suffice to say that the intention behind the granting of the order cannot be clearer. Since the order of the Industrial Court (including reinstatement) is being challenged the order for stay is only logical **until the matter or can finally be disposed of**. Not to do so would make the order of reinstatement has the stamp of finality. It cannot surely be the case.

If the reinstatement order is not so stayed and reinstatement, though challenged, takes place it is not too difficult to see what damage the claimant would have left in his trail, if, and when the reinstatement order is found by the High Court to have been wrongly made. The wages and emoluments collected would certainly have been beyond recall. Such is the consequence of not granting stay and interpreting that there is no power of the Court to order stay. It certainly leads to absurdity.

I find the order for stay has been properly and legally made and would have been made even if the applicant has not drawn to the learned Judge the provision of s. 33B(2) of the Industrial Relations Act. I rule against the respondent on the point of so-called misconduct.

I now deal with the respondent's allegation of applicant's alleged non-compliance with the requirement of O. 53 of the Rules of the High Court 1980.

Order 53/1-14/27 of the **Supreme Court Practice 1988,** Vol. 1 (page 14 of P1) on application for leave reads:

> Leave should be granted, if on the material then available the Court thinks, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant ...
>
> The statement contained in the notice of application is not the equivalent of or *analogous* to a statement of claim, but rather only to the prayer of a statement of claim. On the other hand, the supporting affidavit must set out and verify all the facts relied on, including any relevant evidence relied on.

I think whether O. 53 High Court Rules 1980 has been satisfied duly must be derived on whether its objective of trying to answer simply whether an arguable case for the granting of relief by the applicant is capable of being made out. If the answer is in the negative it has not satisfied that order.

In my view, by reading the statement (not in affidavit), particularly the reliefs sought and the grounds which consist of statement of Court records and the affidavit in due form, stating the facts on oath, I am of the view that O. 53 had been complied with as when they are together read, answer that an arguable case can be made out if the applicant succeeds in his proof. I therefore find that the respondent has no merit in his objection.

For reasons given above, I dismissed the respondent's application in enclosure (10) with costs to the applicant and I hereby order that Penolong Kanan Pendaftar do fix a date for the hearing of the applicant's substantive motion in enclosure (6).

PUBLIC PROSECUTOR

v.

DATUK HJ. ABDUL HALIK KHANIZAMAN KHAN

HIGH COURT, KOTA KINABALU
TUAN IAN H.C. CHIN J.
[CRIMINAL APPEAL NO. 12 OF 1992]
12 FEBRUARY 1994

CRIMINAL APPEAL: Charge of corruptly accepting gratification - Section 4(a) Prevention of Corruption Act 1961 - Acquittal - Whether justified - Accomplice evidence - Whether corroborated - Non-admissibility of uncorroborated accomplice evidence - Departure from rule - Whether special circumstances existed.

EVIDENCE: Discrepancies - Court unable to sieve truths from lies in evidence of witness - Whether evidence not to be acted upon - Whether rejection of evidence in toto justified.

This was an appeal by the Public Prosecutor against the acquittal of the respondent on a charge under s. 4(a) of the Prevention of Corruption Act 1961, for corrupt acceptance of gratification. Before the learned Sessions Judge, evidence was led that the appellant, as Chairman of the Sabah Land Development Board (the Board), had corruptly asked for and received a cash cheque for RM60,000 from two businessman (Abdul and Michael) as a favour for releasing to the said Abdul and Michael advance payment of RM500,000 for some roadwork to be undertaken by a company for the Board. Evidence was further led that after receiving the cash cheque the respondent handed the cheque to one Teo for cashing, and that the said Teo had in turn handed the same to Annuar Nu, since deceased, who eventually cashed the cheque and handed the cash money back to Teo.

Teo gave evidence that he handed over the RM60,000 to the respondent on the same day he received the said cheque. But his evidence on many other points were full of discrepancies that the learned Sessions Judge ruled that he "proved to be the most difficult witness, who was prepared to lie, be elusive and evasive" and made a finding that it was dangerous to act on his evidence. The learned Judge further ruled that both Michael and Abdul were accomplices whose evidence must be corroborated and since no corroboration was forthcoming, their